SERVED: May 28, 1992

NTSB Order No. EA-3577

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 18th day of May, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

Docket SE-11401

GEORGE O. GRANT,

Respondent.

OPINION AND ORDER

In Grant v. National Transportation Safety Bd., F.2d (No. 91-70095, 9th Cir. March 30, 1992), the U.S. Court of Appeals vacated and reversed our December 14, 1990 decision in this proceeding. There, we dismissed as untimely respondent's appeal of the Administrator's emergency order revoking his airman mechanic certificate.[1] The court remanded the case for a final decision on the merits within 60 days. This decision complies with that direction.[2]

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[1] NTSB Order EA-3239 (1990).

[2] The court decided, on the one hand, that our failure to act on the emergency appeal within the 60 days prescribed in the

(continued. . .)

The emergency order of revocation in this proceeding charged respondent with violations of sections 43.2(a) and 43.1.2 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 43).[3] The charges stemmed from respondent's sale of an aircraft (Cessna

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[2] (..continued)
statute did not divest us of jurisdiction, but concluded, on the other hand, that the Board could not hold respondent to an appeal deadline when we had failed to meet ours. We agree with dissenting Judge Rymer, who notes not only that the Board's failure timely to act has nothing to do with the certificate holder's obligation to file a timely emergency appeal, but that our dismissal order was supported by substantial evidence (the standard of review) , and that the "fairness" standard used by the majority has little application to the government and no relevance to these facts.

[3] § 43.2(a) as pertinent reads:

§ 43.2 Records of overhaul and rebuilding.

(a) No person may describe in any required maintenance entry or form an aircraft, airframe, aircraft engine, propeller, appliance, or component part as being overhauled unless -

(1) Using acceptable methods, techniques, and practices acceptable to the Administrator, it has been disassembled, cleaned, inspected, repaired as necessary, and reassembled.]

§ 43.12 as pertinent reads:

§ 43.12 ~~Maintenance records: Falsification, reproduction, or~~ alteration.

(a) No person may make or cause to be made:

(1) Any fraudulent or intentionally false entry in any record or report that is required to be made, kept, or used to show compliance with any requirement under this part[.]

(b) The commission by any person of an act prohibited. under paragraph (a) of this section is a basis for suspending or revoking the applicable airman . . . certificate . . . issued by the Administrator and held by that person.

N9712H) to Mr. Len O. Hannaman, Jr. A hearing was held before Administrative Law Judge William A. Pope, II on November 16, 1990.

The Administrator first introduced t-he deposition of Mr. Hannaman, who testified to an agreement to purchase a rebuilt aircraft from respondent (owner and president of Air Parts, Inc.). See Exhibit A-1. One of the conditions of sale was a "zero time" seaplane propeller (i.e., a propeller that either was brand new or had been completely overhauled). Deposition at 8-9. Instead, Mr. Hannaman later learned that the propeller on the Cessna sold to him was not new or rebuilt. It had only been cleaned and repainted. Allegedly, this was the only propeller work that respondent had directed.[4] Id. at 31 and Exhibit C-8. This testimony was confirmed by an employee of Dominion Propeller Service.[5]

In addition, Mr. Hannaman sponsored into evidence various log books intended to show respondent's falsifications., The logbook for the propeller (Exhibit C-6, p. 3), for example, indicated that it was installed on April 15, 1987, and had zero hours at that time. Exhibit C-8, the Dominion Propellers work order, shows that the propeller was not cleaned or repaired until May 13, 1987. The parties stipulated that respondent made this log book entry. Transcript at 78-79.

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[4]The propeller work was done by Dominion Propeller Service.

[5]Another witness, qualified as an expert propeller repairman, also testified that the propeller had not been overhauled. Transcript at 106.

Thereafter, the Administrator rested. Respondent immediately moved to dismiss the proceeding on two grounds: that there was no proof of intentional falsification;[6] and that the regulations at Part 43 applied only to aircraft in certain categories, proof of which the Administrator had not offered.[7] The law judge rejected the first claim. He then found, however, that, because the Administrator had not proven that the. aircraft at issue had a U.S. airworthiness certificate, he had failed to prove a fact critical to enforcing the cited regulations. The law judge also denied the Administrator's request to reopen to introduce the necessary proof on this issue.[8]

The Administrator appealed these holdings.[9] He argues that

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[6] See footnote 3, supra. Section 43.12 requires showing of a fraudulent or intentionally false entry. Proof of the former is more extensive than proof of the latter.

[7] § 43.1 Applicability.

(a) Except as provided in paragraph (b) of this section, this part, prescribes rules governing the maintenance, preventive maintenance, rebuilding, and alteration of any - -

(1) Aircraft having a U.S. airworthiness certificate;

(2) Foreign-registered civil aircraft used in common carriage or carriage of mail under the provisions of Part 121, 127, or 135 of this chapter; and

(3) Airframe, aircraft engines, propellers, appliances, and component parts of such aircraft.

[8] The initial decision, an excerpt from the hearing transcript, is attached.

[9] The law judge had earlier declined the Administrators motion to dismiss as untimely respondent's appeal of the Administrator's revocation order. The Administrator appealed that decision as well. Because, in our prior decision (NTSB (continued. ..]

the record should have been reopened to receive evidence that Part 43 was applicable. Alternatively, he claims that sufficient evidence existed in the record as made to establish the applicability of Part 43.

We affirm the law judge's decision not to permit the record to be reopened after the Administrator rested. We agree with the Administrator that motions to reopen in such situations should not be looked upon with great favor. Appeal at 18. We must disagree, however, that the result reached by the law judge somehow is "trial by ambush and ridged [sic] rules of procedure." Id. Contrary to the Administrator's characterization, we find Administrator v. Gayneaux, 4 NTSB 2013 (1984), especially relevant and its reasoning compelling.

In that case, the law judge deferred a ruling on a Coast Guard motion to reopen the record. The motion to reopen was prompted by respondent's motion to dismiss, which pointed out that critical issues (i.e., the identity of the craft and the operator -- very similar to the issue before us here) had not been proven. The law judge later granted the motion. On appeal, we stated:

> The deficiency in the Coast Guard's case at the time the investigating officer rested was neither minor nor technical in nature. The Coast Guard concealedly had failed to establish a fundamental part of its substantive prima facie case. Absent introduction of additional evidence by the Coast Guard, the charge against appellant was not sustained. . .

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[9] (...continued)
Order EA-3239), we reversed that holding, we did not reach the issues before us today.

> In apparent recognition of the fact that a party has a fundamental right to dismissal of a case where the essential elements of the charge have not been proven, the Coast Guard's Manual. . expressly authorizes the filing of a motion to dismiss to test the sufficiency of the evidence. While we recognize that there may be valid reasons for a law judge to reserve decision on such a motion until after an appellant puts on a defense. or decides not to submit any evidence, deferring a ruling on a motion to dismiss for the purpose of affording the Coast Guard what amounts to a second opportunity to prove its case is not such a reason. Moreover, the deferral in this instance not only deprived appellant of his right to challenge the Coast Guard's evidence at the appropriate time, but additionally, since it was the motion itself which apparently alerted the Coast Guard to the necessity for further proof of its case, the deferral also effectively turned the exercise of that right against. him.

Id. at 2014-2015. Emphasis added. Given the many parallels between that case and this, including respondent's opportunity under our rules to file such "a motion (see 49 C.F.R.821.14), we would have difficulty distinguishing it even if we were inclined to do so.

We are also compelled to reject the Administrator's alternative argument that the record already contains the necessary proof of Part 43 applicability. We address each separate basis for this claim, in turn.

The Administrator first contends that N9712H was entitled to and had an airworthiness certificate, having been manufactured under a production certificate. He follows that this certificate continued in effect so long as "the maintenance, preventive maintenance, and alteration are performed in accordance with Parts 43 and 91 and the aircraft is registered in the United States." Appeal at 16, emphasis in original. For a number of

reasons, this argument must fail.

As respondent notes, the parties agreed that those portions of Exhibit C-4 that did not involve respondent's entries (including page 2, which contained the manufacturer's 1977 certification that an airworthiness certificate was issued) would not be considered.[10] Even were this material to be considered, the record lacks sufficient probative evidence regarding other parts of the aircraft and their maintenance history to permit the necessary finding that maintenance, preventive maintenance! and alteration were performed in accordance with Parts 43 and 91. In addition, such a finding would be in direct contrast to the theory of the complaint and with the evidence of record concerning the condition of the propeller. E.g., the record at this juncture establishes not that all maintenance had been performed, but that the propeller was in serious need of repair. Exhibit A-1 deposition at 33.[11]

The Administrator also argues that the Board should assume that N9712H had an airworthiness certificate because it is a civil aircraft and cannot be operated legally without one. This argument begs the question. Proof, not assumptions, are what the Administrator must produce. In any case, an assumption that Mr.

[10]Tr. at 77-78. In view of problems of authenticity raised by respondent, counsel for the Administrator specifically agreed that only entries made by respondent would be considered.

[11]We also question, but need not resolve, whether the original airworthiness certificate continues to apply to an aircraft when, as here, original and substantial parts (e.g., wings) have been replaced. See Exhibit A-1 deposition at 7.

Hannaman's operation of this aircraft was legal in all aspects is not warranted by the record testimony that he operated the aircraft without the required propeller documentation. Id. at 20, 23, 27.

Finally, the Administrator argues that § 43.l(a)(3) covers the instant situation, and eliminates the need, under (a)(l) , to prove the aircraft had an effective airworthiness certificate. This reading of the section is, however, untenable.

As relevant, the section prescribes rules governing the "maintenance, preventive maintenance, rebuilding, and alteration of any: (1) Aircraft having a U.S. airworthiness certificate; (2) Foreign-registered civil aircraft used in common carriage or carriage of mail under the provisions of Part 121, 127, or 135 of this chapter; and (3) Airframe, aircraft engines, propellers, appliances, and component parts of such aircraft." The Administrator's argument -- that the "such" in subparagraph (3) refers to "the any aircraft to which the specific part is attached or may be attached" (Appeal at 17) -- is inconsistent with a plain reading of the provision. Under a plain reading, the items in subparagraph (3) refer to parts of the specific aircraft identified in (1) and (2) , and this reading is also consistent with the structure of the regulation.

The Administrator's reason for this interpretation is equally unpersuasive. He claims that, otherwise, he could not act against a mechanic until the component part was installed on an aircraft. That may well be, but we see no harm in that

result. We also note that Part 145, which governs activities of repair shops (as opposed to mechanics) , is phrased very differently, referring directly to the parts, as opposed to the aircraft in which they are installed. One could reasonably assume, therefore, that the difference in the regulations was intentional.

ACCORDINGLY, IT IS ORDERED THAT:

The Administrator's appeal is denied.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the-Board, concurred in the above opinion and order.